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Supreme Court, U.S.
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No. 04-1073

In the Supreme Court of the United States

EL AMIN BASHIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court).

The court of appeals has already denied petitioner's motion for leave to file a supplemental brief to raise a

Blakely claim, finding that his belated request was insufficient under circuit precedent to preserve the issue. Pet. App. 26a-27a. However, in *United States* v. *Senn*, where the court of appeals had also denied petitioner's motion for leave to file a supplemental brief to raise a *Blakely* claim, this Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Booker* and *Fanfan*. See *United States* v. *Senn*, No. 04-7175 (Feb. 28, 2005). Accordingly, the appropriate disposition here is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See 125 S. Ct. 769.

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MARCH 2005

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* The government waives any further response to the petition unless the Court requests otherwise.